

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR13-3016

TIMOTHY KOENCK,

TRANSCRIPT OF
SENTENCING

Defendant.

The Sentencing held before the Honorable Mark W. Bennett, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, February 3, 2014, commencing at 1:30 p.m.

APPEARANCES

For the Plaintiff: TIMOTHY T. DUAX, ESQ.
Assistant United States Attorney
Terra Centre - Suite 670
600 Fourth Street
Sioux City, IA 51101

For the Defendant: BRADLEY RYAN HANSEN, ESQ.
Assistant Federal Defender
Suite 400
701 Pierce Street
Sioux City, IA 51101

Also present: Chad Zach, U.S. Probation

Reported by: Shelly Semmler, RMR, CRR
320 Sixth Street
Sioux City, IA 51101
(712) 233-3846

1 THE COURT: Thank you. Please be seated. Good
2 afternoon.

3 THE CLERK: This is Case Number 13CR3016-1, United
4 States of America versus Timothy Koenck. Counsel, please state
5 your appearance.

6 MR. DUAX: Tim Duax appearing on behalf of the United
7 States.

8 THE COURT: Good afternoon, Mr. Duax.

9 MR. DUAX: Good afternoon, Your Honor.

10 MR. HANSEN: Brad Hansen for Timothy Koenck, Your
11 Honor. Good afternoon.

12 THE COURT: Good afternoon, Mr. Hansen. And thank you
13 for filing a comprehensive brief in this matter which I've given
14 a lot of thought to over the weekend.

15 Have you had a full, fair, and complete opportunity to
16 review the presentence report with Mr. Koenck?

17 MR. HANSEN: Yes, Your Honor.

18 THE COURT: And do you agree that the total offense
19 level is 34, criminal history category 5, advisory guideline
20 range on Counts 1, 6, and 7 235 months to 293 months; Count 1
21 carries a statutory maximum of life; Count 6 and 7 carry
22 statutory maximum terms of 20 years; Count 2 is a 10-year
23 mandatory minimum, and that must run consecutive to Count 1?
24 Did I get that right?

25 MR. HANSEN: I agree with all that, Your Honor.

1 THE COURT: And does the government agree with that?

2 MR. DUAX: Yes, Your Honor.

3 THE COURT: Okay. And the only issue really is your
4 motion for downward variance; is that correct?

5 MR. HANSEN: I believe so, Your Honor.

6 THE COURT: Okay. Why don't we hear argument on your
7 motion.

8 MR. HANSEN: Thank you, Your Honor. At the outset
9 before I forget, I'd like to move for admission of Defendant's
10 Exhibit A which consists of A1 through A23.

11 * * * *

12 (Defendant Exhibit A was offered.)

13 * * * *

14 THE COURT: Any objection?

15 MR. DUAX: No objection, Your Honor.

16 THE COURT: Those exhibits -- I guess that exhibit
17 with the subsections is admitted.

18 * * * *

19 (Defendant Exhibit A was admitted.)

20 * * * *

21 MR. HANSEN: Thank you, Your Honor. On the motion for
22 a downward variance, I'm relying on two bases somewhat related
23 but two separate bases.

24 The first in my sentencing memorandum and the first
25 that I'll address is a policy-based argument against United

1 States Sentencing Guideline 4B1.5(a) in this case. Effectively
2 this is the career offender provision for sex offenders. It
3 says so essentially right in the amendment that brought about
4 this change to the guidelines in 2001 that this guideline,
5 4B1.5, works in tandem or together with the career offender
6 provision. So in a lot of ways, it has many similarities to the
7 career offender provision that the Court has addressed on many
8 occasions and --

9 THE COURT: Well, in some respects it's harsher, isn't
10 it, because it only requires one predicate offense?

11 MR. HANSEN: Correct, Your Honor.

12 THE COURT: Although there are two predicate offenses
13 here.

14 MR. HANSEN: There are two predicate offenses here,
15 Your Honor, including --

16 THE COURT: Including the one that I sentenced the
17 defendant on.

18 MR. HANSEN: Right, Your Honor. That's correct.

19 THE COURT: And I showed him considerable leniency in
20 that sentencing. I actually recall that sentencing.

21 MR. HANSEN: I agree with that. A 57-month sentence,
22 I believe, in that case was indeed reasonable and lenient. So
23 yes, the Court's correct. In some ways the repeat and dangerous
24 sex offender guideline is more severe than the career offender
25 provision in that it only requires one predicate offense.

1 THE COURT: Now, why do you think that might be?

2 MR. HANSEN: That's hard to know. I scoured the
3 legislative history. My best interpretation from looking at the
4 congressional record and looking at the amendment itself and the
5 reasons for the amendment is that this change to the guidelines
6 came about in the same time period as the child pornography
7 guidelines were getting ramped up. So it came about at a time
8 that there was a lot of worry about whether child pornography
9 offenses were punished severely enough or whether in this case
10 more severe, frankly, sex offenses are being punished enough.

11 So that's my best guess as to why the career offender
12 provision is a little more forgiving, for lack of a better way
13 to put it, than the repeat and dangerous sex offender guideline
14 but could not find anything expressly in the congressional --
15 the legislative history to reflect that.

16 But like the career offender provision, the table in
17 4B1.5 is keyed to statutory maximums. So we're not talking
18 about a case in which this guideline is the -- based off of
19 empirical data or sentencing data generally. It is keyed to the
20 statutory maximum and keyed based on what I said in my
21 sentencing memorandum a goal of incapacitating repeat sex
22 offenders and punishing them severely.

23 So whereas those are certainly valid considerations
24 for the Court under 18 U.S.C. 3553(a), as I said in my memo,
25 there has to be more. There has to be a consideration of the

1 whole defendant, not just the fact that he has a predicate
2 offense that puts him under this guideline and then obviously an
3 instant offense as it does as well or in this case two predicate
4 offenses.

5 So it's a severe guideline just like the career
6 offender provision keyed to the statutory maximum. I have to
7 acknowledge the, I guess, weakness in this part of my argument
8 based on the sentencing that I had before Your Honor last week
9 that the career offender -- the policy disagreement that you
10 have with the career offender provision is quasi-categorical.

11 So I think for Mr. Koenck to get relief under my first
12 argument, you would have to effectively say he's kind of like a
13 Lori Newhouse for the repeat and dangerous sex offender
14 provision, and that might be admittedly hard to do.

15 But I do think, as I said last week in the sentencing
16 we had on Friday, that the problems with the repeat and
17 dangerous sex offender guideline, 4B1.5, are like the career
18 offender provision. They're universal. They are problems in
19 the genesis of the guideline. And I think that that's cause for
20 relief for Mr. Koenck in that respect because the guideline
21 under which he falls wasn't necessarily the product of a fair
22 consideration and a thoughtful consideration by the sentencing
23 commission.

24 And independently but also relatedly, as I said, I
25 think there's grounds for a variance on 3553(a) grounds.

1 Certainly I cannot argue that the nature and circumstances of
2 the instant offense are grounds for a variance. It's a very,
3 very serious offense obviously as the Court recognizes.

4 And in terms of history and characteristics, there are
5 also aggravating circumstances certainly in Mr. Koenck's
6 criminal history. But as I said in my sentencing memo, there
7 are mitigating circumstances.

8 Mr. Koenck obviously has a severe problem with sex
9 offenses for lack of a better way to put it. But he's also a
10 guy that obviously in my short time of being in the federal
11 public defender's office we have never received as many letters
12 of reference as we did for Mr. Koenck. And they were good
13 letters. They were very good letters, very thoughtful letters
14 from both family and actually primarily members of the Fenton,
15 Iowa, community.

16 This is a guy who -- it's tough to say this, but but
17 for what he's done that's led him to be prosecuted for sex
18 offenses, this is a guy that was a model member of the
19 community.

20 THE COURT: Well, I don't disagree with that.

21 MR. HANSEN: Right.

22 THE COURT: But that's a big thing to overlook.

23 MR. HANSEN: That's a big but, Your Honor, I agree.

24 THE COURT: It's a very large Mount Everest to climb.

25 MR. HANSEN: I agree, Your Honor.

1 THE COURT: It's like climbing Mount Everest on one
2 leg with no supplemental oxygen and no outdoor heavy-duty gear.

3 MR. HANSEN: I think of myself as rather physically
4 fit, but I could not do that, Your Honor.

5 But the whole person, the whole Timothy Koenck, is a
6 guy who was a valuable member of the Fenton, Iowa, community,
7 and I think that's borne out by the 23 letters of recommendation
8 as the Court recognized. This also was not a guy who -- beyond
9 his good deeds in the community, he's a guy who was socially
10 productive. He has a college degree. He had good jobs which,
11 you know, somewhat of a double-edged sword in that it makes it
12 all the more galling that we're here on a case like this. But
13 he's a guy who has lived a productive life, again, but for what
14 he's done that's led him to be here today.

15 And I think the last thing I want to touch on was my
16 argument regarding Mr. Koenck's age. He's 54 years old as of
17 today, and I think although no one knows how long someone's
18 going to live, I think it's safe to say that if he gets what the
19 guidelines recommend plus the 120-month consecutive mandatory
20 he'll probably die in prison. And I pointed to United States
21 versus Craig.

22 THE COURT: Yeah, I'm familiar with that case.

23 MR. HANSEN: Yeah.

24 THE COURT: And Judge Posner's concurring opinion in a
25 per curiam decision.

1 MR. HANSEN: Right. Concurring opinion, Seventh
2 Circuit, certainly no binding authority on the Court, but I pose
3 it as a consideration for the Court in determining whether -- I
4 mean, there's going to be a long sentence in this case but
5 whether it should be a super long sentence.

6 And I think some of the statistics that Mr. -- Mr. --
7 Judge Posner cited in Craig are relevant here. It's certainly
8 true that sex offenders generally are more likely to recidivate.
9 But as Judge Posner said, in terms of comparing an elderly sex
10 offender to a non-elderly sex offender, the elderly sex offender
11 is far less likely to commit a new offense and --

12 THE COURT: And the facts in that case are pretty
13 egregious too.

14 MR. HANSEN: Right.

15 THE COURT: Yeah.

16 MR. HANSEN: Right. If I'm --

17 THE COURT: Not all that dissimilar from this offense
18 as I recall.

19 MR. HANSEN: I agree with that, Your Honor. So I ask
20 the Court -- the Court's already seen United States versus
21 Craig. I ask the Court to consider it and consider what Judge
22 Posner had in there.

23 And a factor that this Court has considered before
24 related to age is a sentence, a variance in this case, would
25 allow for Mr. Koenck to have hope for release which is a factor

1 that bears on his rehabilitation, the ability of prison
2 officials to make sure he behaves, although I've no doubt that
3 Mr. Koenck will behave, but this Court's relied on it as a
4 3553(a) factor in the past, and I think it's certainly relevant
5 here where a guideline sentence would be effectively a life
6 sentence.

7 So beyond that, if the Court has any questions,
8 obviously glad to answer them, but those are the bases for
9 Mr. Koenck's motion for a downward variance, Your Honor.

10 THE COURT: Well, turning to the Craig decision,
11 actually the facts in Craig were in some ways more egregious
12 than here, at least in terms of the guideline calculations
13 because I think the defendant scored -- I have it in front of
14 me, and I just noticed the defendant had a total offense level
15 of 43.

16 MR. HANSEN: I think that's right, Your Honor.

17 THE COURT: So it was a life sentence, but the
18 statutory maximum was 30 years.

19 MR. HANSEN: Right, right.

20 THE COURT: On that point, what do you think of a
21 guideline, at least in the Craig case -- it's not true in this
22 case, but in the Craig case what's the rationale for a guideline
23 computing a sentence that's life when the statutory maximum is
24 30 years? What is the possible rational basis for the guideline
25 in that sentence?

1 MR. HANSEN: I don't think there's any rational basis
2 for a guideline to exceed a statutory maximum, Your Honor. I
3 believe we've had that in a case that Mr. Smart argued here
4 where the guideline sentence was life but the maximum was 30
5 years.

6 THE COURT: Oh, I've had that in -- I've had a
7 guideline range exceed the statutory maximum on many occasions.

8 MR. HANSEN: I'm sure.

9 THE COURT: And I'm just -- I'm trying to figure out
10 what the possible rational basis for that could be by the
11 commission.

12 MR. HANSEN: I don't think there could be any rational
13 basis for the guidelines to provide for a sentence that is
14 greater than Congress mandates is possible under circumstances.
15 I don't think there's anything, whether empirical in nature or
16 otherwise, that can support a guideline sentence such as that.

17 THE COURT: But that doesn't apply to this case
18 because none of the guideline ranges exceed the statutory
19 maximum.

20 MR. HANSEN: That's correct, Your Honor.

21 THE COURT: Anything else you'd like to argue?

22 MR. HANSEN: Not at this time, Your Honor.

23 THE COURT: I notice the government did -- oh, yeah,
24 they did file a sentencing memorandum. I'm sorry. But I don't
25 believe you addressed United States versus Craig. So have you

1 read United States versus Craig?

2 MR. DUAX: No, Your Honor. I've only read the
3 portions that were cited in the defendant's memorandum. I
4 didn't prepare this memorandum. I didn't look at the Craig
5 case. I apologize, Your Honor. I should have done so.

6 THE COURT: Well, yeah, that's my next question. Is
7 it too much of me to expect, particularly when the defendant
8 doesn't cite a whole lot of cases and one of their primary
9 arguments is based on a case, in this case United States versus
10 Craig, that the government lawyer would have read it and be
11 prepared to argue it?

12 MR. DUAX: No, Your Honor.

13 THE COURT: I mean, I read it.

14 MR. DUAX: I apologize. I should have read the case
15 and been prepared to discuss it. I did not. That's my fault.

16 THE COURT: Well, then I won't ask you about it.
17 What's the government's position?

18 MR. DUAX: Your Honor, with respect to the part of the
19 variance motion that dealt with the offender guidelines, I think
20 it was addressed in Newhouse at page 968 of your opinion in
21 Newhouse -- and I quote -- I recognize that some offenders have
22 earned career offender status and should be sentenced within the
23 career offender guideline and in rare instances higher.

24 I think in this case, when you do look at the more,
25 when you do look at the 3553(a) factors with respect to this

1 defendant, this offense, and this defendant's history and
2 characteristics, that he fits in that statement, that he has --
3 by virtue of his two prior convictions, one in this court, has
4 earned career offender status and also when you look at the
5 nature of these offenses that they weren't products of impulse.
6 They required planning and grooming and repeated contacts and
7 then travel across state lines to meet and that these things
8 were done in the present case by a defendant who was 52 years
9 old who had already been convicted, had already served prison
10 time for the very same offense to come back and do this again,
11 to do it without remorse.

12 I think along those lines in the presentence report in
13 paragraph 12, there are some chats from June of 2011 in which
14 the defendant actually seems to be bragging about his prior
15 offense where he says, "I did four years in prison, Google me,
16 Timothy P. Koenck."

17 So, you know, that's the opposite of remorse. I mean,
18 that's essentially trying to gain credibility on the back of his
19 prior offense.

20 And so when you look at all of those things, this is
21 clearly someone who has -- it's not a Newhouse situation. This
22 is someone who based on their 3553(a) factors and
23 characteristics is clearly a career offender, and this conduct
24 has gone on for a long time, his initial offense. I think he
25 was convicted in 2000 and up to now.

1 He's been through prison. He's also been through
2 quite a bit of treatment. He went to treatment between his
3 state conviction and his first federal conviction. And then
4 after Your Honor sentenced him, he went through 3 years of sex
5 offender treatment between 2005 and 2008, and then he was
6 released, and within 4 years we have him back again on
7 incredibly egregious conduct, I mean, grooming -- you know,
8 grooming a 12-year-old girl and then, you know, engaging in
9 sexual contact, hands-on contact, with her.

10 So in terms of looking at the (a) factors, he hits all
11 of them, and he hits all of them in an aggravating way.

12 In terms of the part of the argument on behalf of the
13 defendant where he points to the defendant's recommendations
14 from the community, I think you have to acknowledge -- when you
15 evaluate those recommendations, you have to evaluate this
16 defendant's ability to manipulate people. In the span of
17 approximately a month, he starts at ground zero first contact
18 with a 12-year-old girl, and within a month he has this girl
19 willing to meet with him and travel to a hotel with him. He's a
20 master manipulator.

21 He convinced -- in the offense before Your Honor, he
22 convinced a girl from Louisiana to spend 4 days with him, and we
23 have insight into what happened during those 4 days again in
24 paragraph 12 in the chats where he describes the best thing that
25 she let him do which was a horrible thing.

1 And so you have to acknowledge that this individual,
2 you look at him, he looks like an ordinary guy, but he has an
3 ability to manipulate that I think most of us would find hard to
4 duplicate. And that ability to manipulate may be involved in
5 why he's able to portray outwardly this individual who's just a
6 great guy while he's out doing all of the things that are in
7 this presentence report. I mean, there's other -- other victims
8 in here too, 15-year-olds, 16-year-olds. And all that's going
9 on simultaneously with this outward facing conduct that inspires
10 these letters.

11 THE COURT: And a 23-year-old intellectually
12 challenged woman.

13 MR. DUAX: That was in a paragraph that the defendant
14 objected to, and so I'm not going to refer to that.

15 THE COURT: Yeah, okay.

16 MR. DUAX: But that was in the PSR. But in other
17 paragraphs that were not objected to --

18 THE COURT: Right.

19 MR. DUAX: -- you had individuals in Wisconsin and
20 Minnesota where he sent e-mails, he sent an 8-page story
21 fantasizing about having sex with a 15-year-old girl.

22 And so when you look at his history, his
23 characteristics, what you see is an individual who's just not
24 going to be stopped, that if he's in the public he is going to
25 be out there, he is going to be committing offenses.

1 Even though I have not read the Craig case from the
2 defendant's brief, the point of it seemed to be that he should
3 receive leniency because he's older and because if you give him
4 the guideline sentence it will be an extremely long sentence.

5 However, when you consider the nature of this
6 particular offense, it just simply does not require a great deal
7 of physical strength to overpower a 12-year-old girl. He does
8 most of his work -- when he commits this offense, the type that
9 we're here for today, the type that we were here for on his
10 prior conviction in front of Your Honor, he does most of that
11 work on the computer through chats, on the phone, through texts,
12 and that doesn't require physical strength at all.

13 And so to say that he's less likely to recidivate,
14 absolutely true. But is he still able to recidivate? Again,
15 absolutely true. And what are the consequences of his
16 recidivism? What happens if he recidivates? You have a very
17 young girl whose life is going to be twisted and damaged for the
18 rest of her life. And that's why, with all due respect to Judge
19 Posner, I don't agree with the conclusion. Again, I didn't read
20 all the facts, and maybe there's something in there that would
21 make me agree with it.

22 THE COURT: I doubt it.

23 MR. DUAX: But the general --

24 THE COURT: I don't agree with much of it. I'm sure
25 you wouldn't. I mean, it's very interesting, but I'm not sure

1 he's got -- his social science data is all that accurate.

2 MR. DUAX: I saw data that -- again, and I apologize,
3 Your Honor. There's no excuse for me not reading Craig.

4 THE COURT: You don't -- once is enough. Once is
5 enough.

6 MR. DUAX: And -- but I know in Almazan in your
7 orders -- in your order in Almazan you cited different
8 statistics about recidivism with respect to people who have a
9 very clearly demonstrated sexual interest in children which this
10 defendant does, and that led to a different conclusion, in the
11 government's view the correct conclusion, which is that this
12 individual's been through everything he can be through in order
13 to deter him, and it didn't work. And the consequences of his
14 future offending are so severe that it requires a long sentence.

15 And to give him some sort of variance or windfall in
16 exchange for some --

17 THE COURT: Well, wait a minute. I take exception to
18 the fact that a variance is a windfall.

19 MR. DUAX: Poor choice of words.

20 THE COURT: Have you ever heard a court describe it
21 that way? A variance is earned by the judge's analysis of the
22 3553(a) factors. I don't view that -- a windfall is something
23 that's undeserved. Now, the government may disagree with the
24 judge's view about whether it's deserved or not, but we're not
25 out here handing out variances as a matter of windfalls.

1 MR. DUAX: I agree w --

2 THE COURT: Are we?

3 MR. DUAX: No, we're not.

4 THE COURT: Okay.

5 MR. DUAX: I think it would be a windfall if he
6 received a variance for --

7 THE COURT: That's a different question, sure.

8 MR. DUAX: Because that's an opinion.

9 THE COURT: Yeah, right.

10 MR. DUAX: That it would be a windfall if he received
11 a variance in order to motivate him to be a good prisoner.

12 THE COURT: Well, what's --

13 MR. DUAX: I think that's his obligation regardless of
14 what sentence Your Honor gives him. His obligation is to be a
15 good prisoner and to do what he's told to do while he's in
16 prison. To try to ask for a lower sentence in order to -- you
17 know, if you don't, I'm going to behave badly, I don't think --
18 that doesn't seem to be a very -- a very fair rationale there or
19 something that --

20 THE COURT: Well, one of Posner's points was that -- I
21 think what he called excessively long sentences really don't
22 have any deterrent value, and he goes through his typical kind
23 of economic analysis of that. So in this case I think the
24 Posner view would be that a judge ought to con -- he didn't
25 dictate what a judge ought to do. He just said a judge ought to

1 carefully consider whether in this case the mandatory minimum
2 240 months provides sufficient deterrence compared to, for
3 example, the bottom of the guideline range which is 355 months.
4 What's the value of that extra 115 months in terms of either
5 deterrence to this defendant or in terms of general deterrence?

6 And he goes on to argue that a defendant who's going
7 to commit this crime would not be deterred by knowing that, gee,
8 they're going to get a 355-month sentence, but they would be
9 deterred by a -- I guess I had that wrong; I flip-flopped it --
10 that a 355-month sentence would be needed for deterrence when a
11 240-month sentence wouldn't deter? What's your response to that
12 argument?

13 MR. DUAX: In this particular case, specific
14 deterrencewise, you'd have an extra ten years in which children
15 would be living in a Koenck-free environment which would be
16 great, much, much safer, very much worth doing. And
17 particularly in light of the fact that, as I've discussed, given
18 the nature of his offenses, because they don't require a great
19 deal of physical strength in order to perpetrate, he would still
20 be at risk to reoffend for a lot of different reasons other than
21 just that. So the ten years specifically where he's out of
22 circulation would definitely protect the public from him in a
23 better way.

24 In terms of general deterrence --

25 THE COURT: Yeah, that's a specific deterrence

1 argument, right.

2 MR. DUAX: Correct.

3 THE COURT: Yeah.

4 MR. DUAX: In terms of general deterrence, one of the
5 things that we know about this defendant in a much more specific
6 way than we know about other defendants a lot of times is that
7 he was on the chat rooms basically chatting with other people
8 that at least were to a degree like him. I think he says it's
9 so awesome to finally find a person that thinks these things are
10 cool. And during the course of that he tells this other person
11 what he got, what his sentence was.

12 And so in terms of general deterrence, the number --
13 will 355 or 360 months shock somebody who hears that more than
14 240? Sure. It's a bigger number. The bigger the number the
15 more the shock value.

16 And so obviously you're looking at these if you're
17 using kind of a -- I don't know what all lines in the graph
18 Posner had running at the same time, but, you know, obviously
19 there's a slope of the line of deterrence. The number -- what
20 if the number was a thousand years in prison? That would have a
21 deterrent level, and 20 years would have a lower one, and
22 there's a slope of that line in terms of its effect on the
23 people that Koenck might come into contact with or people who
24 would hear of what Koenck gets today in his community which they
25 will.

1 And poised against that line is the line of how much
2 does it cost to incarcerate someone for the extra ten years and,
3 you know, or to whatever number that you choose.

4 And so those lines run, and I suppose what you're
5 being asked to do is to evaluate thoughtfully is there a point
6 where the deterrent value slope is so low and the cost is so
7 steep that you would then switch from deterrence and address
8 cost.

9 And with respect to the nature of the harm that this
10 defendant causes, I don't think that's ever going to be a really
11 good trade. If you saved sixty or seventy thousand dollars for
12 ten years, yeah, that adds up to quite a bit of money. But in
13 terms of keeping the community of his victims, 12-year-olds or
14 15-year-olds, safe, it's worth paying that amount to do that.

15 And again, will the bigger number have a bigger
16 effect? Common sensewise tells you yes. In terms of judging
17 the degree to which it will, hard to say. Hard to say what the
18 slope of that line is. You know, I don't know. And people in
19 the community, if they read a 30-year sentence in a press
20 release, is that -- what does that tell them vis-a-vis a 20?
21 Well, it's 10 years more. It's more severe.

22 THE COURT: Well, that's one thing Posner criticizes
23 the Department of Justice for which I've never -- I've
24 criticized DOJ a lot but never for what Posner did, and that was
25 he says you don't get out into the community enough what the

1 sentences are. That's not been my experience. I think you're
2 pretty good about making that information available in press
3 releases. So that's a back-handed compliment.

4 MR. DUAX: Thank you, Your Honor.

5 THE COURT: What about -- what about -- you weren't
6 the lawyer in Newhouse.

7 MR. DUAX: I was not.

8 THE COURT: Yeah. But you're familiar with it.

9 MR. DUAX: Yeah, generally, yeah.

10 THE COURT: Yeah. Do you think there are any
11 differences in the victims in Newhouse versus this case that
12 would justify -- well, there are many reasons why one could not
13 follow Newhouse in this case. But I was wondering if the
14 government had any view about the difference in victims. And
15 then I'm going to come back to you, Mr. Hansen, on that as well.

16 MR. DUAX: The victim of someone who sells illegal
17 drugs, assuming that they're -- I mean, if they're a minor,
18 that's one question. Is that the Court's question, what's the
19 difference between a minor who's sold drugs by a Newhouse and a
20 minor who's sexually violated by Koenck?

21 THE COURT: Well, it's a little -- no, it's different
22 than that. In Newhouse the predicate offenses were -- she was
23 in a hotel room with, I think, four or five other people, and
24 there were small amounts of meth and maybe seven to ten
25 psilocybin mushrooms, something like that. And as a result she

1 never got a day even in jail let alone prison. So the victims
2 on her predicate offenses were I guess -- the presentence report
3 says there's no identifiable victim. I always chafe a little
4 bit at that. While that's true there may not be identifiable,
5 to the extent that that suggests there are no victims, that's
6 inaccurate. Maybe it doesn't suggest that because society's a
7 victim in drug cases, and they're actually real victims from the
8 sale and use of it.

9 But is there an appreciable difference in the victims
10 in Newhouse versus this case that in and of itself might justify
11 not following Newhouse? Do you catch the drift of that? Or
12 not?

13 MR. DUAX: I understand you're asking me to talk about
14 different types of victims. In terms of -- can you say it one
15 more time, Your Honor? I want to make sure I follow.

16 THE COURT: Yeah, in terms of whether or not to grant
17 relief from the career offender guideline. See, in Newhouse --

18 MR. DUAX: Yes, I think there are differences in
19 victims. And could you use those differences to disagree with
20 the -- with the guidelines? Absolutely I think so because it
21 would go to the harm that's perpetrated by the defendant which
22 if you look at the (a) factors, the consequences of the offense,
23 the characteristics of the offense are part of that calculus.
24 And so I think yes. I think you could consider it on a variance
25 and line it up against that guideline and see -- see how it's

1 stacked up.

2 THE COURT: Okay. Anything else you'd like to argue?

3 MR. DUAX: No, Your Honor.

4 THE COURT: Okay. Thank you, Mr. Duax.

5 Mr. Hansen?

6 MR. HANSEN: Thank you, Your Honor. Specifically as
7 to the Court's last question to the government on the
8 distinction between the victims in a Newhouse-type case and a
9 4B1.5(a) case, I think, you know, it would take some severe
10 mental gymnastics for me to say that they're equivalent in terms
11 of the victims. I think the -- there's a more specific victim
12 in any case like this than there is in a drug case, so I think
13 that's -- I think that's a given.

14 THE COURT: And wasn't that part of the reason why I
15 didn't agree with you last time because they were crimes of
16 violence which I viewed and I think I'm entitled to view under
17 Kimbrough as more serious than the lower-level drug offenses?

18 MR. HANSEN: Right.

19 THE COURT: Right.

20 MR. HANSEN: I agree. I think obviously at best I can
21 get a quasi-categorical policy disagreement on 4B1.5(a) from the
22 Court. And, you know, although I do think that the problems in
23 that guideline are universal, they're present in every case, I
24 agree. If the Court kind of follows down the road it's been
25 going down on the career offender cases, I might have a pretty

1 tough time on my first argument for a variance.

2 THE COURT: Can I interrupt you for another question?

3 MR. HANSEN: Sure.

4 THE COURT: Do you know of any court anywhere that has
5 expressed a policy disagreement with 4B1.5(a)?

6 MR. HANSEN: Your Honor, I can say that I researched
7 this for hours and hours and hours, and I did not find one, so I
8 have to grant that as well.

9 THE COURT: I'm not surprised you --

10 MR. HANSEN: Right.

11 THE COURT: You're always so incredibly thorough that
12 I'm not surprised about your research. I didn't really know the
13 answer, but I suspected it was nobody has.

14 MR. HANSEN: It was surprising to me that there are
15 very few -- published isn't the right word but very few opinions
16 that have made it to the Westlaw and Lexis discussing in any
17 depth 4B1.5 or 4B1.5(a) specifically.

18 So yeah, there's certainly no case in which a court
19 has expressed a policy or a quasi-categorical policy
20 disagreement with 4B1.5(a) or 4B1.5 more generally. But to be
21 frank, there are no cases really discussing it at all in terms
22 of offering any critiques or support for the guidelines. So
23 that is what it is. I think --

24 THE COURT: Why do you think that is?

25 MR. HANSEN: Well . . .

1 THE COURT: It probably happens much less frequently
2 in a sex offender case, a career offender guideline, than in a
3 drug case or crimes of violence.

4 MR. HANSEN: I think that's right. I pored over our
5 office's previous records and only found scant few cases in
6 which this guideline has come up, so I think that's one reason.
7 I honestly don't know when the career offender provision, the
8 original career offender provision, came about in the
9 guidelines. But 4B1.5(a) is certainly newer, so I think that
10 explains it as well. But I do think the primary reason is that
11 we see the regular career offender provision come up far more
12 often than this particular one.

13 Not to put words in the government's mouth, but I
14 think -- I think we're in agreement that there are -- there are
15 similarities between a case like this and a career offender
16 case. I think we part on whether that's a basis for a variance.
17 So that -- I'll just leave that where it lie for now.

18 I did want to respond to the point about the letters
19 of reference that Mr. Koenck received. And the government's
20 interpretation of why he has so much support is one
21 interpretation.

22 But what I see in here is not manipulation. I see a
23 guy who did a lot of good things for his community, and I think
24 it speaks to the point in his sister's letter, Miss Bents -- A2
25 I believe it is, Exhibit A2 -- that this part of Mr. Koenck that

1 led to him being here is one part of him. It's a really,
2 really, really, really bad part of him, but it's one part of
3 him.

4 I don't think that this manipulation or whatever you
5 want to call it spills over into other aspects in Mr. Koenck's
6 life. And I don't think it negates the relevance and the
7 mitigating aspects of the letters reflected in Exhibit A. So I
8 did want to say that on the 3553(a) grounds for a variance.

9 And then briefly on the idea of general versus
10 specific deterrence, we're all kind of at a disadvantage here in
11 that we can't see into the future 20 years or 30 years from now.
12 So in terms of specific deterrence, I grant as I granted in my
13 memo that, I mean, it's necessarily true that Mr. Koenck is less
14 likely to offend as the sentence goes up.

15 But the question is -- as the government pointed out,
16 is there a point at which the line kind of levels off and the
17 benefits of a longer prison sentence recede I guess for lack of
18 a better way to put it. And I think it's a hard question for
19 both of us. I mean, I don't know who Mr. Koenck's going to be
20 when he's 70, 75 years old. The government doesn't know. The
21 Court doesn't know. So it's really -- I think it comes down to
22 a feeling from the Court based off of the years and years of
23 experience that you have with sentencing people how you feel
24 about that.

25 But in terms of general deterrence, you know, again,

1 we don't have statistical data to say what the shock value is
2 for a 240-month sentence versus a 360-month sentence versus
3 something worse.

4 I can just say as a matter of common sense if I were
5 sitting for some reason on the Department of Justice website as
6 I'm sure many people are reading press releases and I saw that
7 an individual was sentenced to 240 months in prison or something
8 slightly more than that for a crime like this, that would get my
9 attention. That is a long, long prison sentence.

10 THE COURT: Yeah, I can't imagine actually any
11 rational human being saying, oh, gee, I'll commit the crime if
12 I'm only going to get 240 months, but, boy, if I'm going to get
13 355 months, I'm not -- it's going to deter me from committing
14 the crime.

15 MR. HANSEN: Right.

16 THE COURT: I think that's pretty much nonsense
17 actually.

18 MR. HANSEN: I think that's right. And from having
19 read press releases from DOJ, I know they say right in there
20 that it's 240 months without parole. So that wouldn't be
21 anything that would soften the blow of such a sentence.

22 So while specific deterrence, I recognize there are
23 reasons to believe that a longer sentence would necessarily
24 deter Mr. Koenck from doing something. And in terms of general
25 deterrence, I really don't think there's any support for the

1 idea that as the sentence goes up there's any real incremental
2 value in deterring the public so . . .

3 THE COURT: I think if there was there'd be a lower
4 homicide rate in jurisdictions that have the death penalty.

5 MR. HANSEN: One would think so, Your Honor. So with
6 that I think I've responded to what I wanted to respond to but
7 obviously, again, glad to answer any questions.

8 THE COURT: I'm out.

9 Mr. Duax, anything else you'd like to add?

10 MR. DUAX: No, Your Honor.

11 THE COURT: Okay. Thank you. Mr. Koenck, you have
12 the right to -- as you know from appearing in front of me before
13 but I still have a legal obligation to repeat it, you have the
14 right to say anything to me you want to. You don't have to say
15 anything. You have a right to remain silent. If you exercise
16 your right to remain silent, I will not hold it against you in
17 any way. But if you'd like to say something, I'd be happy to
18 hear from you. Is there anything you'd like to say?

19 THE DEFENDANT: No thank you, Your Honor.

20 THE COURT: Okay. Okay. In this case I find the
21 total offense level is 34, criminal history category 5, advisory
22 guideline range of 235 to 293 months on Counts 1, 6, and 7 and a
23 120-month consecutive sentence on Count 1. All the counts carry
24 a mandatory minimum 10-year sentence. Count 1 carries a maximum
25 of life, Count 6 and 7, 20 years.

1 I spent a lot of time thinking about the sentence in
2 this case over a period of several days and reread the Craig
3 case. And, Mr. Hansen, I agree with the thrust of your argument
4 that this particular guideline suffers from some of the
5 deficiencies that I found in the other career offender guideline
6 in terms of there's no empirical data, isn't based on any
7 expertise of the commission; it's really a congressional
8 directive. And as you argued in your brief, I do not have to
9 give it as much credence -- or you had a better word for it --
10 less deference. I don't have to give it as much deference as
11 guidelines where the sentencing commission has exercised its
12 institutional expertise and utilized empirical analysis. And I
13 agree with that.

14 But having said that, ultimately I have to pick a
15 sentence that is sufficient but not greater than necessary to
16 achieve all of the sentencing purposes. And I side much more
17 heavily with the government's analysis of the appropriate
18 sentence in this case than I do with your analysis. I think if
19 there had been one predicate offense and it was older I might be
20 able to grant some relief. But for whatever reason I'm stuck on
21 the fact that the guideline only requires one predicate offense
22 and there are two predicate offenses, and I believe the nature
23 of the victims in this case is infinitely more egregious than
24 the victims in the Newhouse case or low-level drug dealer cases
25 where I generally have a policy -- modified policy disagreement

1 with the guidelines.

2 And so one of the ways I figure out whether I have a
3 policy disagreement with the guidelines is I don't read the
4 guideline calculations in the order that they're presented in
5 the presentence report which I think most judges do. I read the
6 nature of the offense and then the 3553(a) factors. And then I
7 look at what I think really untethered to the guidelines which
8 we're really not supposed to do under Kimbrough and Gall and
9 even more recent cases saying that, you know, the guideline is a
10 starting place. But my own view is if you do it as the starting
11 place, you're too anchored to the guidelines.

12 So what I like to do is I read everything but the
13 guideline calculations, and in this case I've never seen this
14 enhancement, so I had no idea what the guidelines would be, what
15 the calculations would be. I just say what do I think is a
16 reasonable sentence? And it's never a precise sentence. It's
17 always a range. And my range was not really -- was not
18 different than the guideline calculations which normally it is.
19 I think you know me well enough to know that, you know, I very
20 frequently grant relief from the guidelines because I think
21 they're too severe and too harsh.

22 In this case given the fact that he's a recidivist
23 offender and the impact on the victims is of such great
24 consequence, I don't find the guideline range to be different
25 than what I thought a reasonable sentence would be under the

1 overarching principle of sentencing, Title 18, 3553(a), trying
2 to come up with a sentence that is sufficient but not greater
3 than necessary.

4 And so in balancing the 3553(a) factors, I think there
5 are mitigating factors that you indicated. I'm even willing to
6 give you the benefit of the doubt of your view of the mitigating
7 factors versus the government's more cynical view which, you
8 know, they have a right to be cynical, so I'm not -- I don't
9 mean that in a pejorative sense at all. They have a right to
10 view it cynically, and I think a reasonable person could view it
11 that way.

12 But even giving the defense the benefit of the doubt
13 that Mr. Koenck has done a lot of good things for the community,
14 that does not outweigh the number of violations and the
15 seriousness of the violations and the impact that it has on the
16 victims.

17 And so with a heavy heart but trying to do this as
18 objectively as I can, it's my judgment that Mr. Koenck is
19 sentenced on Counts 1, 6, and 7 to the bottom of the guideline
20 range of 235 months, and on Count 2, I must impose a mandatory
21 120-month sentence consecutive. And when I say with a heavy
22 heart, I really mean that because this means chances are greater
23 than not that Mr. Koenck is going to die in a United States
24 prison.

25 And actually I was doing some heavy-duty research this

1 weekend on a law review article I'm just finishing on average
2 life expectancy of inmates, and with the exception of
3 characteristics that Mr. Koenck does not have, there's really
4 strong evidence that the life expectancy in prison is much
5 shorter than it is elsewhere.

6 And so I realize that -- and when I say heavy heart,
7 you know, when I sentence somebody and I think they're going to
8 die in a United States prison, that's very, very hard on me, and
9 I do it with the greatest of reluctance. And recognizing that
10 that's probably going to happen, I have to overcome my emotional
11 response because I think the sentence that I've just imposed is
12 a reasonable sentence. And I just want to make clear I'm not
13 giving the guidelines any presumption of reasonableness. I
14 never do. Matter of fact, you know, my view is just the
15 contrary. I kind of go into sentencing with a general
16 impression that the guidelines are presumptively unreasonable
17 and presumptively harsh. But in this case I don't -- I just
18 don't find that to be.

19 So I know you don't agree with my sentence, and I
20 don't expect you to, but I would like the benefit of the doubt
21 that even though you have an absolute right to disagree with it
22 you know that I gave this sentence as much thought as I've given
23 any other sentence I've ever imposed. And I spent a lot of time
24 on deciding what an appropriate sentence would be because
25 depriving somebody of their liberty should never be easy, and it

1 should never be done in a routine, mechanical guideline-like
2 fashion. At least I'm unable to do it that way.

3 So upon release from imprisonment which I hope
4 happens, you'll be placed on supervised release for 10 years on
5 Counts 1, 6, and 7 and 3 years on Count 2 to run concurrently.
6 While you're on supervised release, you'll have the standard
7 conditions. You can't violate any state, local, or federal law.
8 You can't possess any illegal drugs. You cannot possess a
9 firearm, ammunition, destructive device, or dangerous weapon.
10 You'll cooperate in the collection of a DNA sample.

11 You'll have a number of special conditions because
12 this is a sex offender case. So you'll participate in any
13 mental health evaluation and treatment including any sex
14 offender treatment program. You'll take any medications
15 prescribed by a licensed physician. You're prohibited from
16 owning or having in your possession any pornographic materials
17 of any kind.

18 You shall submit to a polygraph examination as a
19 containment strategy for the management of your sex offender
20 treatment. You're prohibited from using photographic equipment,
21 computers, or any electronic storage device to view or produce
22 any child pornography.

23 You shall not have any contact with any children under
24 the age of 18 including through letters or any other type of
25 communication device without the prior consent of your United

1 States probation officer. You're prohibited from going to
2 places where minor children under the age of 18 congregate such
3 as parks, beaches, pools, daycare centers, playgrounds, and
4 schools without prior permission from your United States
5 probation officer.

6 You must remain in compliance with all of the offender
7 registration and public notification requirements of the Adam
8 Walsh Child Protection and Safety Act of 2006.

9 You'll be subject to the standard search conditions
10 which means United States probation officers can search your
11 person, residence, place of employment, computers, cellphones,
12 cameras, and the like if they have reasonable suspicion you're
13 violating your supervised release. And any computer or
14 electronic storage device or other electronic device will be
15 subject to random, periodic, unannounced monitoring and searches
16 by the United States Probation Office.

17 You don't have the ability to pay a fine, so the fine
18 is waived. There's a \$400 special assessment of a hundred
19 dollars on each count due and owing. You're remanded to the
20 custody of the United States marshal to serve this sentence.

21 There's an appeal waiver in this case which means
22 you've given up your right to appeal. So unless the sentence
23 that I imposed is illegal, unconstitutional, or in violation of
24 the plea agreement, you have no right to appeal. In those very
25 limited situations, if you decide to appeal, you need to file a

1 written notice of appeal with the clerk of our court no later
2 than 14 days from the date your judgment is filed. If you can't
3 afford to pay for a lawyer, pay for the costs of an appeal,
4 those costs will be paid on your behalf.

5 I'd ask the U.S. marshals to accommodate a family
6 visit.

7 And, Mr. Hansen, is there anything further on
8 Mr. Koenck's behalf?

9 MR. HANSEN: Just one brief thing, Your Honor.
10 Mr. Koenck would like to request a recommendation of a BOP
11 facility as close as possible to Green Bay, Wisconsin, where his
12 sister who's here today lives.

13 THE COURT: Okay. I'll be glad to make that
14 recommendation to the Bureau of Prisons.

15 MR. HANSEN: Thank you, Your Honor.

16 THE COURT: I wanted to thank you, Mr. Hansen, for
17 your conscientious representation. I thought you wrote a really
18 terrific brief on a very, very difficult factual and legal case.
19 So I know both of you are disappointed in the result, but it
20 wasn't from a lack of effort by the lawyer.

21 MR. HANSEN: Thank you, Your Honor.

22 THE COURT: So I appreciate your hard work very much.

23 And anything further on behalf of the United States,
24 Mr. Duax?

25 MR. DUAX: Your Honor, just to move to dismiss Counts

1 3, 4, and 5.

2 THE COURT: And I'm sure the defense has no objection
3 to that.

4 MR. HANSEN: No objection, Your Honor.

5 THE COURT: Those counts are dismissed. Thank you.
6 We'll be in recess.

7 (The foregoing sentencing was
8 concluded at 2:22 p.m.)
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CERTIFICATE

21 I certify that the foregoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.
23

s/ Shelly Semmler
Shelly Semmler, RMR, CRR

4-4-17
Date